# In the Court of Appeal of Alberta

**Citation: Alberta (Workers' Compensation Board) v Alberta (Appeals Commission for Alberta Workers' Compensation), 2026 ABCA 286**

**Date:** 20260904
**Docket:** 2503-0024AC
**Registry:** Edmonton

**Between:**

**The Workers' Compensation Board**

Appellant

- and -

**Appeals Commission for Alberta Workers' Compensation**

Respondent

- and -

**Administrator of the Estate of Thomas Flueck**

Respondent

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**The Court:**

**The Honourable Acting Chief Justice Dawn Pentelechuk**
**The Honourable Justice Kevin Feehan**
**The Honourable Justice Kevin Feth**

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**Memorandum of Judgment**

Appeal from the Judgment by
The Honourable Justice J.D. Martin
Dated the 16th day of January, 2025
Filed the 24th day of February, 2025
(2025 ABKB 26, Docket: 2303 06408)

## Memorandum of Judgment

**The Court:**

### Introduction

[1] The Workers' Compensation Board (WCB) appeals a chambers judge's decision which upheld the decision of the Appeals Commission for Alberta Workers' Compensation granting Thomas Flueck a Level 3 personal care allowance for past care.

[2] The Appeals Commission utilized the WCB policy that was in effect when the allowance claim was initially determined by the WCB's case manager in 2018 and applied it to two periods: August 1983 to December 1985 and January 1, 1988 to September 30, 2002 (the Benefit Periods). The WCB contends the chambers judge erred in confirming the Appeals Commission's "retroactive" application of the WCB policy and by upholding the finding that Mr Flueck was entitled to the allowance for the Benefit Periods.

[3] For the reasons that follow, the appeal is dismissed.

### Background

[4] The facts are not in dispute. Mr Flueck was injured in a workplace accident on August 21, 1983. His right arm was amputated above the elbow and he later experienced back pain and a spinal curvature resulting from the amputation. His injury also aggravated pre-existing schizophrenia.

[5] Mr Flueck received several benefits from the WCB but did not initially request and was not considered for a personal care allowance from 1983 to 2017. The allowance provides financial support for severely injured workers needing temporary or permanent in-home care.

[6] A personal care allowance is authorized by section 82 of the *Workers' Compensation Act*, RSA 2000, c W-15 (*Act*): "If a worker is disabled and is receiving home and community care that is, in the opinion of the Board, comparable in the circumstances to facility-based care, the Board may pay an allowance in respect of that home and community care." Eligibility for an allowance is determined by the WCB's policies, which are established by the WCB's board of directors.

[7] On October 30, 2017, Mr Flueck requested that the WCB consider his eligibility for a past and ongoing personal care allowance starting August 21, 1983.

[8] In April and May 2018, a WCB case manager, applying versions of WCB policies that were in place from time to time over the years, determined that Mr Flueck was eligible for the allowance under the policy criteria from 2002 onwards, but ineligible under the criteria prevailing from the accident date to September 30, 2002. Mr Flueck's claim was denied for the earlier period.

[9] Mr Flueck passed away on March 18, 2020, and his estate appealed the denial. In March 2022, the Dispute Resolution and Decision Review Body upheld the case manager's decision to deny the allowance for the earlier period.

[10] Mr Flueck's estate appealed the Review Body's decision to the Appeals Commission and sought entitlement to a Level 3 personal care allowance from August 21, 1983 to September 30, 2002. The estate argued the WCB should have used the criteria in the version of the WCB policy effective December 1, 2013 (Policy 04-07, Part I and Policy 04-07, Part II, Application 4), which was operative when the case manager's decision was made ("2018 Policy"), to establish Mr Flueck's entitlement back to 1983.

[11] On November 8, 2022, the Appeals Commission decided that the 2018 Policy applied and Mr Flueck was entitled to a Level 3 personal care allowance for the Benefit Periods: Decision No: 2022-0547, 2022 CanLII 106006 (AB WCAC) [Appeals Commission Decision]. No eligibility was established for 1986 and 1987.

[12] The WCB filed an appeal under section 13.4(1) of the *Act* and an application for judicial review in the Court of King's Bench. The WCB argued that the Appeals Commission erred in law and mixed fact and law by applying the 2018 Policy retroactively, rather than applying earlier versions of the policy to the time periods for which they were effective, and by granting the allowance to Mr Flueck for the Benefit Periods.

[13] The chambers judge concluded the Appeals Commission correctly selected and applied the 2018 Policy and that its entitlement decision was reasonable. The statutory appeal and the judicial review application were dismissed: ***Alberta (Workers' Compensation Board) v Alberta (Appeals Commission for the Alberta Workers' Compensation)***, 2025 ABKB 26 [KB Decision].

[14] The WCB appeals the KB Decision to this Court.

**Grounds of appeal**

[15] The WCB argues the chambers judge erred in:

a) his interpretation of the 2018 Policy, and in particular, by upholding the Appeals Commission's finding that the Policy applies "retroactively" to the period preceding its 2013 "effective date" for a personal care allowance; and

b) finding that the Appeals Commission's determination about Mr Flueck's entitlement to the allowance for the Benefit Periods was reasonable.

**Standard of review**

[16] Section 13.4 of the *Act* provides for an appeal of the Appeals Commission Decision to the Court of King's Bench on a question of law or jurisdiction. Questions of mixed fact and law are addressed through judicial review.

[17] The parties disagree about whether the 2018 Policy has the force of law but agree that its interpretation is a question of law: see ***Shuchuk v Alberta (Workers' Compensation Board)***, 2007 ABCA 213 at paras 22, 32 [***Shuchuk***]; ***Patrus v Alberta (Workers' Compensation Board, Appeals Commission)***, 2011 ABQB 523 at paras 22-25 [***Patrus***]. They accept that the standard of review for questions of law is correctness, the interpretation of the 2018 Policy attracts correctness, and the chambers judge selected the proper standard. They disagree on whether he erred in applying that standard to the Appeals Commission's interpretation of the Policy and specifically its finding that the allowance provisions applied "retroactively".

[18] The parties also agree that the application of the 2018 Policy to the facts of Mr Flueck's claim is a question of mixed fact and law, attracting reasonableness review, and the chambers judge again applied the proper standard. They disagree about his finding that the Appeals Commission reasonably determined Mr Flueck was entitled to the allowance for the Benefit Periods.

[19] We concur that where both a statutory appeal and judicial review are engaged, as here, the questions of law or jurisdiction examined through the appeal are subject to a standard of correctness, and the questions of fact and mixed fact and law examined through judicial review are subject to a standard of reasonableness: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at paras 23, 37, [2019] 4 SCR 653 [***Vavilov***]; ***Yatar v TD Insurance Meloche Monnex***, 2024 SCC 8 at para 48. Correctness therefore applies to the interpretation of the 2018 Policy and reasonableness applies to the Appeals Commission's finding that in these circumstances, Mr Flueck was entitled to the allowance for the Benefit Periods. The judicial review ensures the decision is "transparent, intelligible, and justified", focusing on the internal rationality and logic of the decision-maker's reasoning: ***Vavilov*** at paras 15, 85, 102.

[20] In considering this appeal, no deference applies to the chambers judge's interpretation of the 2018 Policy. On the appeal from the judicial review, this Court "steps into the shoes" of the chambers judge in reviewing the determination made by the administrative decision-maker, such that the "appellate court's focus is, in effect, on the *administrative* decision" (emphasis in original): ***Zarooben v The Workers' Compensation Board***, 2022 ABCA 50 at paras 23-24 [***Zarooben***], citing ***Merck Frosst Canada Ltd v Canada (Health)***, 2012 SCC 3 at para 247, [2012] 1 SCR 23.

## Analysis

### a) The WCB policy language

[21] The WCB's policies governing eligibility for personal care allowances have changed over the years. On April 5, 1983, the WCB issued Policy ADJ-17 which stated that injured workers could receive a personal care allowance in defined circumstances. On December 9, 1993, the WCB issued a new version of Policy ADJ-17, effective January 1, 1992, which revised the eligibility criteria (the 1993 Policy). On February 15, 1997, the WCB rescinded its existing body of policies and replaced them with a Consolidated Policy Manual, which continues to this day with some revisions. The Consolidated Policy also provides for a personal care allowance, which is referenced in Policy 04-07, Part I and Policy 04-07, Part II, Application 4.

[22] From 1997 to 2018, Policy 04-07 underwent several revisions. However, the core eligibility criteria for personal care allowances remained unchanged. Eligibility required a worker to be "severely injured" and to satisfy specific criteria. Under the Policy, a "worker is considered severely injured when", as a result of the compensable injury, the worker requires "temporary or permanent assistance with communication, mobility or self-care." The specific criteria include that "in order to live at home, a worker needs assistance with communication, mobility, self-care, or supervision due to the compensable injury", and the worker is normally not confined to "a hospital, nursing home, or other institution" unless the worker is temporarily hospitalized for up to 30 days. The parties agree Mr Flueck met the eligibility criteria from 1997 onwards.

[23] The dispute between the parties focuses on the meaning of "Question 22" in the version of the policy in place when the case manager's decision was made (the 2018 Policy). Question 22 of Policy 04-07, Part II states: "This policy application (Application 4 – Self-Care) is effective December 1, 2013, and applies to all <u>decisions</u> made on or after that date, except when noted otherwise in a specific policy section(s)" (emphasis added).

[24] The WCB asserts the 2018 Policy language is expressly prospective and excludes eligibility for periods before the effective date of December 1, 2013. The WCB contends the "effective date" defines the start of the period for which the allowance is available under the 2018 Policy. Claims for periods before December 1, 2013, must be brought under the previous versions of the policy, including for the Benefit Periods. The Appeals Commission's finding that the 2018 Policy "operated backwards" to Mr Flueck's accident date offended the common law presumption against retroactivity. Neither the express policy language nor anything arising by necessary implication clearly rebutted the presumption. The WCB says the interpretation that avoids a retroactive effect should be preferred.

[25] In contrast, the estate argues the effective date defines the start of the period during which a decision about a claim is made, regardless of the benefit period covered by the allowance. The

plain language, read contextually, provides for an allowance that starts on the accident date. The 2018 Policy updated the eligibility criteria and the scope of coverage but did not limit the period to which the allowance applies.

**b) Interpreting WCB policy**

[26] Workers' compensation policies are "comparable to subordinate legislation": ***Patrus*** at para 23, citing ***Guy v Nova Scotia (Workers' Compensation Appeals Tribunal)***, 2008 NSCA 1 at para 14, 68 Admin LR (4th) 314 [***Guy***]. By operation of section 13.2(6) of the *Act*, the Appeals Commission "is bound by the [WCB] board of directors' policy relating to the matter under appeal". The WCB's policies define worker benefits under the *Act*, including the personal care allowance promulgated under section 82.

[27] Interpreting the WCB policy is similar to interpreting legislation: ***Shuchuk*** at para 32. The guiding principle is that the words are read in their entire context and in their grammatical and ordinary sense, in harmony with the scheme and object of the *Act*, and the intention of the legislature: ***Rizzo & Rizzo Shoes Ltd (Re)***, 1998 CanLII 837 (SCC) at para 21, [1998] 1 SCR 27.

[28] Entitlement to a personal care allowance is a substantive right under section 82 of the *Act*. Where WCB policies define a substantive benefit under the *Act*, and that description is binding on the Appeals Commission, we conclude the policy terms have the force of law: ***Patrus*** at para 23; ***Guy*** at para 14. The definition must be interpreted consistently with the remedial objects of the *Act*. This approach aligns with the well-established principle that the *Act* is to be "given a broad liberal interpretation, which allows compensation to be provided to as many workers in as many circumstances as the legislative scheme will reasonably permit": ***Shuchuk*** at para 46; ***Zarooben*** at para 34.

[29] Statutory interpretation presumes that a "statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms": ***British Columbia v Imperial Tobacco Canada Ltd***, 2005 SCC 49 at para 69, [2005] 2 SCR 473, citing P. W. Hogg in *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 48-29. The common law also recognizes a presumption against retrospectivity as an aid to statutory interpretation.

[30] The distinction between retroactive and retrospective effect was explained by E.A. Driedger, in "*Statutes: Retroactive Retrospective Reflections*" (1978), 56 Can Bar Rev 264, at 268-69 [*Driedger*]:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It… imposes new results in respect of a past event. A retroactive statute *operates backwards*. A

> retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original]

Professor Driedger's definitions were endorsed by the Supreme Court of Canada in ***Benner v Canada (Secretary of State)***, 1997 CanLII 376 (SCC) at para 39, [1997] 1 SCR 358, and ***Canada (Attorney General) v Hislop***, 2007 SCC 10 at para 127, [2007] 1 SCR 429.

[31] Legislation is generally presumed not to have retrospective operation unless that interpretation is expressly or by necessary implication required by the legislative language: ***Gustavson Drilling (1964) Ltd v Minister of National Revenue***, 1975 CanLII 4 (SCC), [1977] 1 SCR 271 at 279. Importantly, the presumption against retrospectivity "applies only to prejudicial statutes" and "does not apply to those which confer a benefit": ***Brosseau v Alberta Securities Commission***, 1989 CanLII 121 (SCC), [1989] 1 SCR 301 at 318. Statutes "that attach benevolent consequences to a prior event ... do not attract the presumption": *Driedger* at 271; see also ***Thow v BC (Securities Commission)***, 2009 BCCA 46 at para 20; ***Hayward v Hayward***, 2011 NSCA 118 at para 22.

**c) The 2018 Policy has retrospective, not retroactive effect**

[32] We need not determine whether the presumption against statutory retroactivity applies to WCB policies. Policy 04-07, Part II, Application 4 was applied retrospectively by the Appeals Commission, not retroactively, so that presumption is not engaged.

[33] The presumption against retrospectivity is also not engaged in these circumstances. Section 82 of the *Act*, and Policy 04-07, Part II, Application 4, confer a benefit to a worker through the personal care allowance. Consequently, even if the presumption against retrospectivity applies to WCB policies, it does not apply to the interpretation of Policy 04-07, Part II, Application 4 for that allowance.

[34] In the absence of any presumption, we turn to whether the policy language is retrospective. Retrospectivity was explained in the context of new legislation in ***Épiciers Unis Métro-Richelieu Inc, division Éconogros v Collin***, 2004 SCC 59 at para 46, [2004] 3 SCR 257 [***Épiciers***]: "... the new legislation governs the future consequences of <u>events</u> that happened before it came into force but does not modify <u>effects</u> that occurred before that date" (emphasis added). The legislature is otherwise presumed not to have intended to interfere with vested rights, which are tangible and have crystalized: ***Jackson v Cooper***, 2024 ABCA 272 at para 14; ***R v Dineley***, 2012 SCC 58 at para 45, [2012] 3 SCR 272; ***Dikranian v Quebec (Attorney General)***, 2005 SCC 73 at paras 32–36, [2005] 3 SCR 530.

[35] We conclude that Policy 04-07, Part II, Application 4 is retrospective in addressing Mr Flueck's personal care allowance. Under that Policy, a legal effect occurred when the WCB made a decision about entitlement to a personal care allowance. Until then, no rights vested. In the absence of a decision, there was no past effect, only past events. More specifically, Mr Flueck sought an allowance for events occurring during the Benefit Periods (i.e. in-home personal care), which pre-dated the Policy's effective date of December 1, 2013. The decision directing payment of an allowance for past care was the "future consequence of events that happened before" the Policy's effective date but did "not modify effects that occurred before that date": ***Épiciers*** at para 46.

[36] This interpretation is consistent with the grammatical and ordinary meaning of the Policy language. Question 22 states that the Policy "applies to all decisions made on or after" the effective date. If the WCB's board of directors had intended to limit the policy's scope to benefit periods after the effective date, or accidents occurring after that date, or the date a claim arose, it could have expressed the Policy in that way. Instead, it selected the date of the decision.

[37] The choice of language must be viewed as deliberate when contrasted with other provisions in the policy. For example, in Question 19 of Policy 04-07, Part II, Application 4, which addresses a special needs allowance "effective January 1, 1999", the WCB's board restricted eligibility based on "the date of the accident of the claim or claims".

[38] The WCB argues that the effect under Policy 04-07, Part II, Application 4, is the payment of an allowance rather than a "decision" about entitlement. However, the payment flows from the entitlement decision. Until the decision is made, no payment is available. The WCB's argument does not advance its position.

[39] The WCB's interpretation requires entitlement for benefit periods before December 1, 2013, to be evaluated under previous versions of the WCB policies. The WCB concedes that a personal care allowance was available under the *Act* from 1983 onwards but disputes that Mr Flueck was entitled under the eligibility criteria in place from time to time. The difficulty with the WCB's position, however, is that the 1993 Policy and its predecessors were "rescinded" on February 15, 1997. The WCB identified no 2018 Policy language preserving the rescinded policies for the subsequent determination of personal care allowances involving benefit periods pre-dating the rescission. It further acknowledges that "repeal is generally a terminal event, and that when repeal takes effect, the legislation that has been repealed ceases to be binding or to have legal effect."

[40] The Appeals Commission Decision (at para 10) and the KB Decision (at para 39) both reached the same conclusion about the impact of rescinding the policies in 1997, although relying on section 36 of the *Interpretation Act*, RSA 2000, c I-8. That provision addresses the consequences of repeal and replacement where "an enactment is repealed and a new enactment

substituted for it." However, the decisions did not analyze whether the 2018 Policy is an "enactment" within the meaning of the *Interpretation Act*.

[41] An "enactment" is defined in that statute as "an Act or a regulation or any portion of an Act or regulation": s 28(1)(m). An "Act" means "an Act of the Legislature and includes Ordinances of the North-West Territories in force in Alberta": s 28(1)(a). Under s 1(1)(c):

> "regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation, bylaw or resolution enacted
>
> (i) in the execution of a power conferred by or under the authority of an Act, or
> (ii) by or under the authority of the Lieutenant Governor in Council,
>
> but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons. . . .

[42] WCB policies are not an "Act" and do not obviously fall within the scope of a "regulation" or a "rule". The uncertainty about whether WCB policies are regulations or an enactment for the purposes of the *Interpretation Act* was raised in ***Skyline Roofing Ltd v Alberta (Workers' Compensation Board Appeals Commission)***, 2001 ABQB 624 at para 63 and remains unresolved. We need not determine whether section 36 of the *Interpretation Act* applies. Even if it does not, the words of Policy 04-07 do not convey an intention by the WCB's board of directors to preserve policies that were rescinded.

[43] The WCB asserts that retrospectivity is contrary to the purpose and intention of the *Act*, which demands that legislation and polices be interpreted from the perspectives of employers and workers, and the compensation system's stability and viability, and that the meaning of the legislation requires a multifactorial analysis: ***Pasiechnyk v Saskatchewan (Workers' Compensation Board)***, 1997 CanLII 316 (SCC) at para 27, [1997] 2 SCR 890. More specifically, it argues that a retrospective interpretation of Policy 04-07, Part II, might cause "mischief" within the statutory compensation scheme as a whole by "destabilizing certainty and consistency" because the WCB's ability to project present and future costs and assess employer premiums is affected. However, no evidence of any systemic instability is before us. The abstract possibility that a worker might defer a claim until the calculation of the allowance is greater does not explain the magnitude of that possibility or the impact on the system. No evidence is presented that workers delay their claims in the hope of more generous benefits in the future, that allowances frequently become more generous over time, or that employer premiums are materially affected.

[44] Similarly, while the WCB submits that "the retroactive entitlement found by the Appeals Commission will cost the Accident Fund hundreds of thousands of dollars in [personal care

allowances] that it did not account for", it provides no foundation for that estimate. For example, we are not told whether that estimate assumes that workers who received allowances in the past will try to revisit vested claims, nor the basis for any such assumption. More fundamentally, the contention is not supported by evidence.

[45] The WCB suggests retrospectivity fails to balance the interests of employers against those of workers and does not serve the *Act*'s objective of a "sustainable, affordable and fair" system. Apart from the lack of evidence, that contention is belied by the Appeals Commission's historical endorsement of retrospectivity in many circumstances under different versions of WCB policies: see as examples: Decision No: 2023-0303, 2023 CanLII 82121 (AB WCAC) (retrospective entitlement to personal care allowance under Policy 04-07 effective October 1, 2021 back to 1995); *2018-0056 (Re)*, 2018 CanLII 11200 at paras 11.4, 15-17 (AB WCAC) (retrospective entitlement to housekeeping allowance under Policy 04-10, Part II effective December 1, 2013 back to 2012); and *2017-0614 (Re)*, 2017 CanLII 75161 (AB WCAC) (retrospective entitlement to housekeeping allowance under Policy 04-10, Part II effective December 1, 2013 back to 2007). Nothing suggests the Appeals Commission's endorsement of retrospectivity in other cases has compromised the sustainability, affordability or fairness of the system. Moreover, retrospectivity is not inherently nor plainly inconsistent with the *Act*'s objectives.

[46] Finally, while the Appeals Commission Decision and the KB Decision both refer to Policy 04-07, Part II, Application 4, as "retroactive" rather than retrospective, nothing turns on that misnomer. The Appeals Commission correctly applied a retrospective approach in applying the language of the 2018 Policy to the events from 1983 to September 30, 2002.

[47] In summary, a grammatical and ordinary reading of the 2018 Policy in context, having regard for the scheme and the object of the *Act*, leads to a retrospective interpretation of the provisions defining the personal care allowance. This interpretation respects the expansive approach to entitlement described in ***Shuchuk*** and ***Zarooben***, and the legislature's guidance in the preamble to the *Act* that "the central focus of the workers' compensation system is the health and well-being of workers". The Appeals Commission correctly selected and applied the 2018 Policy based on when the WCB made a decision about entitlement.

**d) The Appeals Commission's finding of entitlement is reasonable**

[48] The WCB argues that the Appeals Commission's finding of entitlement is unreasonable because the 2018 Policy was applied to the events from August 21, 1983 to February 14, 1997, and the Commission "failed to provide justifiable reasoning and set out the legal basis for their determination that Mr Flueck was entitled to" the allowance during that period.

[49] The WCB concedes Mr Flueck was entitled to the personal care allowance as of February 15, 1997, and acknowledges that the decisions of the case manager and the Review Body denying

the allowance prior to 2002 were wrong. The WCB contends the Appeals Commission's finding that Mr Flueck was entitled to the allowance for the balance of the Benefit Periods was based on applying the wrong WCB policy. However, as explained, we have concluded the Appeals Commission correctly selected and applied the 2018 Policy retrospectively to the date of the accident.

[50] In front of the chambers judge, the WCB conceded that if the Appeals Commission correctly applied the appropriate policy, then the Appeals Commission Decision entitling Mr Flueck to a Level 3 allowance for the Benefit Periods was reasonable: KB Decision at para 54. The WCB did not advance a contrary argument before us.

[51] In any event, the Appeals Commission extensively reviewed the evidence and provided transparent, intelligible, and justifiable reasons at paragraphs 25.1 to 25.27 and 28 of the Appeals Commission Decision. The decision is reasonable.

**Conclusion**

[52] The appeal is dismissed.

Appeal heard on February 3, 2026

Memorandum filed at Edmonton, Alberta
this 4th day of September, 2026

Pentelechuk A.C.J.A.

Feehan J.A.

Feth J.A.

**Appearances:**

M. Schaub
for the Appellant

J. Morello
for the Respondent Appeals Commission for Alberta Workers' Compensation

T.A. Johnson
M. Chrystian
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